UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOE G. ORTIZ, Appellant, v. UNITED STATES MARINE CORPS, Agency.	DOCKET NUMBER SF07528710802 DATE: JUL 11 1988

William H. Shoats, American Federation of Government Employees, Long Beach, California, for the appellant.

Samuel D. McVey, Esquire, Twentynine Palms, California, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

The agency petitions for review of the initial decision, issued October 21, 1987, that mitigated the appellant's removal to a ninety-day suspension. For the reasons set forth below, the Board GRANTS the agency's petition, VACATES the initial decision, and REMANDS the case for further adjudication.

BACKGROUND

The agency removed the appellant based upon charges of unsatisfactory performance, unauthorized absences, insubordination, and threatening a supervisor. The appellant filed an appeal of this action with the Board's San Francisco Regional Office.

Following a hearing, the administrative judge mitigated the appellant's removal to a ninety-day suspension finding that: (1) The performance-based charge could not be sustained because the agency based that action on 5 U.S.C. Chapter 43, without affording the appellant the substantive right of a reasonable opportunity to improve his performance, as required under that chapter; (2) the agency proved that the appellant was absent without leave on three occasions; (3) the agency proved that the appellant was insubordinate; (4) the agency failed to prove that the appellant threatened his supervisor; and (5) in light of the relevant factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981), a ninety-day suspension was the maximum reasonable penalty for the sustained offenses.

The agency has now filed a petition for review[1] contending that the administrative judge erred in not allowing it to prove that the performance-based charge was

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[1] After the agency filed its petition for review, the appellant submitted a document entitled Cross Petition, Motion to Deny Review. We find, however, that this document is merely a response to the agency's petition, rather than a cross petition for review.

also taken in accordance with the procedures required under 5 U.S.C. Chapter 75.[2]

ANALYSIS

Because the administrative judge erred in denying the agency's prehearing request to present evidence on the issue of whether the performance-based charge was sustainable under Chapter 75, remand for further adjudication is required.

In *Lovshin v. Department of the Navy*, 767 F.2d 826 (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1111 (1986), the United States Court of Appeals for the Federal Circuit held that, despite the enactment of Chapter 43, agencies could take performance-based actions against employees under Chapter 75. In *Fairall v. Veterans Administration*, 33 M.S.P.R. 33, 39-47 (1987), *aff'd*, 844 F.2d 775 (Fed. Cir. 1987), the Board applied the *Lovshin* decision, and held that when an agency exercises its option of using Chapter 75 procedures to effect a performance-based action, the employee subjected to that action has no statutory right to a performance improvement period, and that the agency's failure to provide an improvement period is relevant only to the appropriateness of the penalty.

During the prehearing conference in the present case, the agency admitted that it took the performance-based charge against the appellant under Chapter 43. Hearing

[2] The agency also asserts that the removal penalty is within the bounds of reasonableness for the sustained charges. Because this case is remanded for further adjudication, we need not decide this issue at this time.

Transcript (Tr.) at 4, 7-9. At that time, however, the agency also requested the opportunity to present evidence regarding whether the performance-based charge was sustainable under Chapter 75. Tr. at 9-10. The administrative judge denied the agency's request finding that allowing the agency to change the nature of the action on the morning of the hearing would violate the appellant's due process rights. Tr. at 20. We disagree.

Prior to the Federal Circuit's decision in *Lovshin*, the Board held that because all performance-based actions taken after October 1, 1981, had to be taken under Chapter 43, an agency could not convert an unsustainable Chapter 43 action to a Chapter 75 action. *See Gende v. Department of Justice*, 23 M.S.P.R. 604, 614 (1984), *reconsideration denied*, 25 M.S.P.R. 234 (1984). The Board found that allowing conversion to Chapter 75 would be unfair to appellants because of the differences in proof and defenses between Chapters 43 and 75 actions. Because of these differences, the Board found that allowing conversion would be tantamount to permitting the agency to change charges after failing to prove its initial ones, without providing the appellant the right to respond. *See Callaway v. Department of the Army*, 23 M.S.P.R. 592, 603 (1984).

The Federal Circuit's decision in *Lovshin*, however, reversed the Board's holding that Chapter 43 is the exclusive mechanism for taking performance-based actions. In holding that agencies can take performance-based actions

against employees under Chapter 75, despite the enactment of Chapter 43, the court raised the questions of whether and when a Chapter 43 action may be converted to a Chapter 75 action. *Lovshin* at 843.

Both the Board and the Federal Circuit have held that conversions made after the close of the record are improper. In *Kopp v. Department of the Air Force*, 33 M.S.P.R. 624, 628 (1987), the Board held that an agency could not first assert that a performance-based action taken under Chapter 43 should also be considered under Chapter 75 after a petition for review had been filed. Citing *Callaway*, the Board stated that having lost on the issue of Chapter 43 compliance, the agency could not belatedly try to rely upon another statute in order to obtain a favorable decision.[3]

In *Hanratty v. Federal Aviation Administration*, 780 F.2d 33, 35 (Fed. Cir. 1985), the Federal Circuit also found that after-the-fact switches are inherently unfair, and concluded that the Board may not unilaterally convert a Chapter 43 action to a Chapter 75 action after a hearing had been held and the record had been closed. *See also Wilson v. Department of Health and Human Services*, 770 F.2d 1048,

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[3] We find the administrative judge's reliance on *Kopp* misplaced. The administrative judge found that *Kopp* supports his conclusion that the agency could not convert from Chapter 43 to Chapter 75 prior to the hearing. Initial Decision at 6 n.1. The facts in *Kopp*, however, distinguish it from the present case. In *Kopp*, the agency first raised the conversion issue after the record was closed and a petition for review had been filed. 33 M.S.P.R. at 626-27. In the present case, the agency sought pre-hearing conversion.

1054-55 (Fed Cir. 1985) (court denied the agency's after-the-fact request for consideration of performance-based action under Chapter 75 via remand to the Board).

The present case, however, is distinguishable from these cases because the agency here requested that the charge be considered under Chapter 75 prior to the hearing. Thus, the present case does not present a situation where the agency has lost on the issue and is belatedly trying to prove its charges on another legal basis. Further, allowing the agency to request consideration under Chapter 75 prior to the hearing does not deprive the appellant of due process because he has the opportunity to either respond by presenting evidence and argument on the Chapter 75 issues in question, or to request a continuance to prepare such a response.

We find that the Federal Circuit's decisions in *Hanratty* and *Kochanny v. Bureau of Alcohol, Tobacco and Firearms*, 694 F.2d 698 (Fed. Cir. 1982), support allowing prehearing conversions. In *Hanratty*, the court noted that the case had been consistently treated as arising under Chapter 43 until the administrative judge converted the case to Chapter 75 after the hearing concluded. 780 F.2d at 34-35. Rather than directing the Board to reconsider the case under Chapter 43, however, the court relied on *Kochanny* and held that the agency should be given the opportunity to show that the procedures and action it took conformed to the requirements of Chapter 75, and that the appellant be given

a chance to present any defenses he might have in a properly conducted Chapter 75 proceeding. *Id.* at 35-36.

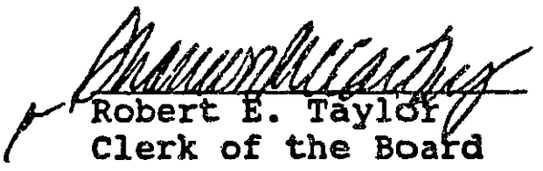
In *Kochanny*, the court found that there was no basis for concluding that an agency must be held to an irrevocable election between Chapters 43 and 75, and that an appellant's loss of Chapter 43 defenses does not amount to a denial of due process. 694 F.2d at 702. The court held that the determinative consideration is whether, from beginning to end, the agency afforded the appellant all of his rights under the chapter on which the removal action was sustained. *Id.* The court also found that the Board's allowing the agency to convert to Chapter 75 did not violate the appellant's procedural rights because, rather than allowing the agency to reinstitute proceedings or alter the basic grounds underlying its action against the appellant, the agency was only given the opportunity to show that the procedures and action it had used conformed to the requirements of Chapter 75. *Id.*

ORDER

We, therefore, remand this case for further adjudication consistent with the Opinion and Order. On remand, the administrative judge shall provide the agency with the opportunity to show that the procedures it used with respect to the performance-based charge conformed to the requirements of Chapter 75. The administrative judge shall also provide the appellant with a chance to present any defenses or reply regarding this issue. The

administrative judge shall then determine whether the performance-based charge is sustainable under Chapter 75, and reconsider the penalty in light of the sustained charges.

FOR THE BOARD:



Robert E. Taylor
Clerk of the Board

Washington, D.C.